76-614

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1976

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BRIAN WILLIAM FIRTH, Appellant

v. NO. A-237

GORDON THOMPSON, et al, Justices of the Supreme Court of the State of Nevada, Appellees

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JURISDICTIONAL STATEMENT

Jerry Collier Lane
P.O. Box 2028
Carson City, Nevada 89701
Attorney for Appellant

Robert List,
Attorney General
Supreme Court Bldg
Carson City, Nev.
89701
Attorney for Appellees

JURISDICTIONAL STATEMENT

The text material hereinafter set forth appears in the order indicated by Supreme Court Rule 15, and is numbered accordingly.

1.(a). The disposition of this action in the lower federal courts was accomplished without written opinions.

(b)(i). This is a civil rights action for declaratory judgment brought pursuant to 28 U.S.C.A., Section 2201, 28 U.S.C.A., Section 1343(3), and 42 U.S.C.A., Section 1983.

(ii). The order, dated June 21, 1976, was entered June 21, 1976 by the United States Court of Appeals for the Ninth Circuit, and, in addition to affirming the judgment of the United States District Court for the District of Nevada theretofore entered on May 30, 1975 following a motion for relief from an order that had been entered on March 11, 1975, it contained a statement that no petition for rehearing would be entertained. The Notice of Appeal was filed September 17, 1976 in the United States Court of Appeals for the Ninth Circuit.

(iii). The statutory provision believed to confer on this court jurisdiction of the appeal is 28 U.S.C.A., Section 1254(2).

(iv). Cases believed to sustain the jurisdiction are: Aetna Casualty & S. Co. v. Flowers, 330 U.S. 464, 67 S.Ct. 798, 91 L. Ed. 1024; Butte & S. Copper Co. v. Clark-Montana Realty Co., 249 U.S. 12, 63 L.Ed. 447; Carr v. Zaja, 283 U.S. 52, 51 S.Ct. 360, 75 L.Ed. 836; Doran v. Salem Inn, Inc., 95 S.Ct. 2561; Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213; and Watson v. Employers Liability Assur. Corp., 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed.635, reh.den. 348 U.S. 921, 75 S.Ct.289, 99 L.Ed.722.

(c). The questions presented by the appeal are:

Can a United States District Court circumvent its duty to decide the legal rights of the parties in a civil rights action brought under 42 U.S.C.A., Section 1983, pursuant to 28 U.S.C.A., Section 1343(3) seeking, under 28 U.S.C.A., Section 2201, a declaratory judgment of denial of due process and equal protection rights by the five justices of a state supreme court through promulgation and enforcement of a court rule in alleged excess of such court's rulemaking power and in alleged contravention of a state statute granting a substantive right to have constitutionality or validity of any state misdemeanor statute determined by the state supreme court?

In such action, is it error for a United States District Court to apply federal certiorari law rather than the state's certiorari law and from such application to conclude, without written opinion, that, "There is no statute of the State of Nevada that requires the Supreme Court of Nevada to grant such a petition; and if there were such a statute, it would be unconstitutional," when the precise issue before the district court was the construction of a Nevada statute that created a special statutory writ of certiorari of a scope restricted to the review of constitutionality or validity of misdemeanor statutes and which required the issuance, in contradistinction to the granting of the relief sought, of such writ, followed by a return and a hearing upon such return, for the purpose of determining the merits?

Did the United States District Court for the District of Nevada, once having been presented with a detailed semantical and syntactical analysis of a Nevada certiorari statute that the declaratory judgment petitioner sought to have construed in order to determine the legal rights of the parties thereunder, err in its failure to construe such statute, in its failure to issue a written opinion, in its failure to make findings of fact and conclusions of law, and in its issuance of an order that stated merely the court's judgment that "There is no statute of the State of Nevada that requires the Supreme Court of Nevada to grant such a petition; and if there were such a statute, it would be

unconstitutional," which conclusion followed the court's application of federal certiorari law rather than Nevada certiorari law?

Did the district court err in concluding, without written opinion, that, "It appears that in three instances the Supreme Court of Nevada denied a petition for a writ of certiorari. There is no reason to believe that the denials were not made because upon review of the petition the Supreme Court believed on the face of each petition they were without merit," when, under Nevada law, the merits of a petition for the special statutory writ of certiorari are not reached upon its filing or upon the issuance of such writ, but only upon the return and hearing upon the return of such writ?

Did the district court err in its failure to issue any written opinion or otherwise indicate, with either generality or specificity, any refutation of the points and authorities or the legal analysis contained in Appellant's brief filed January 28, 1975?

(d) Statement of the case. This action for a declaratory judgment, pursuant to 28 U.S.C.A., Section 2201, upon grounds existing under 28 U.S.C.A., Section 1343(3) and 42 U.S.C.A., Section 1983, for the purpose of determining a question of actual controversy between the parties.

Prior to 1939, Nevada jurisprudence offered no procedure by which the constitutionality or validity of a statute or ordinance could be passed upon by the highest court of the State, the Supreme Court of the State of Nevada, in cases that arose in a justice's or municipal court and were appealed for a trial de novo in a Nevada district court, the district courts having final appellate jurisdiction in such cases by virtue of Article 6, Section 6, of the Constitution of the State of Nevada.

In 1939, the Nevada Legislature created a special statutory writ of certiorari expressly limited in scope to the review of the constitutionality or validity of a statute or ordinance in the circumstances set forth in the preceding

paragraph. The 1939 statute was adopted as an amendment to the pre-existing certiorari statutes that had originally been adopted in 1911 and had remained unchanged during the interim. The said amendment of 1939 became designated as Paragraph 3 of Nevada Revised Statutes 34.020, and it reads as follows:

> "3. In any case prosecuted for the violation of a statute or municipal ordinance wherein an appeal has been taken from a justice's court or from a municipal court, and wherein the district court has passed upon the constitutionality or validity of such statute or ordinance, the writ shall be granted by the supreme court upon application of the state or municipality or defendant, for the purpose of reviewing the constitutionality or validity of such statute or ordinance, but in no case shall the defendant be tried again for the same offense."

In the thirty-odd years that have elapsed since the adoption of the said remedial statute, no writ has been issued thereunder to a defendant, and only one to a prosecuting municipality, notwithstanding the mandatory language of the statute. The number of applications for such a writ during those years cannot be ascertained from the records of the Clerk of the Nevada Supreme Court. Appellant, however, has applied on three separate occasions since 1971, has received three denials of issuance, without written opinion, has applied three times for a rehearing, and has each time been denied. During such period, the Appellees, under the guise of promulgating court rules of procedure, have emasculated the substantive right granted by the statute.

Appellant has never had a day in court on the merits of any of his petitions, as contemplated by the statutes of Nevada, and has thereby been deprived of due process of law and the equal protection of the laws, as guaranteed under the 14th Amendment of the U.S. Constitution.

The Appellees, through abuse of their procedural rule-making power, have unconstitutionally metamorphosed Nevada's statutory certiorari rights, viz., issuance of the writ, return to the writ, and a hearing on the return in order to consider the merits of the petition, into certiorari proceedings like those found in a minority of the states, viz., the New England states, and in the Federal courts, i.e., proceedings in which issuance, return, and the merits are all considered in a single petition and hearing, thereby violating 42 U.S.C.A., Section 1983 and 28 U.S.C.A. 1343(3) as to Appellant.

The acts of Appellees are not the actions of the Nevada Supreme Court, but are instead the acts of the individual justices under color of law, in that the court, under the aforementioned constitutional and statutory provisions, was without authority to promulgate purportedly procedural rules which, in fact, deprive Appellant of substantive rights granted by the Nevada Legislature.

(e). Not applicable.

(f). Statement of the reasons why the questions presented are so substantial as to require plenary consideration.

For some five years, Appellant has been attempting, through the judicial system of the government of the State of Nevada, to secure exposition and clarification of two fundamental precepts of criminal jurisprudence, viz., (1) the identification and designation of the necessary elements of a crime, and (2) the classification of those elements into a dichotomy of (a) elements that must be proved by the prosecuting authority and (b) elements that may be presumed, all within the parameters of the Constitution of the United States and the Constitution of the State of Nevada.

Under Nevada law, misdemeanors are prosecuted in either justice's courts or, in the larger metropolitan areas, in municipal courts. Appeals from convictions thereof may be taken to the appropriate district court, wherein a trial de novo is held. Such district court is, by the

terms of the Constitution of the State of Nevada, the court of last resort with appellate jurisdiction for misdemeanors. However, the Nevada Legislature in 1939 created a new substantive and procedural right to a limited review, by the Nevada Supreme Court, of the constitutionality or validity of a misdemeanor statute upon the existence of certain conditions precedent set forth in such remedial statute. The special statutory writ of certiorari thereby created was separate and distinct from the classical discretionary writ of certiorari in that under the special statutory writ (1) the high court could not review errors of law or excesses of jurisdiction of the inferior tribunal, and (2) the language of the statute made the issuance of such writ, as distinguished from the granting of the relief sought by the petitioner, mandatory upon the existence of the statutory conditions precedent, which existence is readily determinable without any exercise of discretion by the high court. It was only upon the return to the writ, in writing or by oral argument, that the merits, i.e., the points, authorities, and argument in reference to the constitutionality or validity of the underlying misdemeanor statute were to be reached and decided by the Nevada Supreme Court.

Appellant attempted three times, in three different cases, to avail himself of the aforementioned substantive right, and in each case his petition was denied, without opinion, and without other explanation of the court's rationale; and in each case his timely petition for rehearing was denied, without opinion. To this date, Appellant has never been afforded a day in court for a hearing on the merits as to the constitutionality or validity of any statute under which he had been convicted. Following the third such attempt, Appellant petitioned the United States District Court for the District of Nevada for a declaratory judgment as to the legal rights of the parties. That court, in denying Appellees' motion to dismiss, found, inter alia, that the doctrine of judicial immunity would not preclude the granting of declaratory relief, that a substantial controversy involving adverse legal interests existed, and that

the seeking of declaratory relief only, was expressly authorized under 28 U.S.C.A., Section 2201. The Appellees, when ordered to answer Appellant's petition, set up several affirmative defenses that had already been considered and ruled upon by the federal district court in its order denying Appellees' motion to dismiss. The Appellees also asserted, as a Second Affirmative Defense, that the Nevada statute creating the aforementioned substantive and procedural right to have the constitutionality or validity of a misdemeanor statute determined by the Nevada Supreme Court was unconstitutional by virtue of the provision in the Nevada Constitution dealing with appellate jurisdiction of the state district courts; yet no written opinion has ever been handed down or published, in this case or any other, holding the said state statute unconstitutional.

Such conduct, i.e., depriving a person of a statutory right by having the justices of a state's highest tribunal, as respondents in a federal declaratory judgment action, argue to a federal court that the remedial state statute is unconstitutional, without such state's highest tribunal ever having ruled, or published a written opinion so declaring, is manifestly a deprivation of due process of law. Further, it should here be noted that no judgment of the Nevada Supreme Court is valid or is to be given any effect unless and until a written opinion in support thereof is on file with the clerk of such court, by virtue of the Constitution of the State of Nevada.

Appellees, in oral argument to the federal district court in Nevada, also urged that the said state statute was unconstitutional in that it was a violation of the separation of powers provision of the Nevada Constitution, notwithstanding the fact that Appellant's brief, then before such court, contained a detailed chronology and analysis of the Appellees' rulemaking power and their abuse of such power in emasculating a remedial act of the legislature without having had before them, sitting as the state's high court, any case raising the issue of the constitutionality of such act of the legislature, and thus, without having ruled thereon.

Appellees also misled the federal district court, at oral argument, into believing that an inherent power of Appellees, in their capacity as the supreme court, was limited or destroyed by the said remedial statute, when, in fact, no inherent power of Appellees was involved, but instead only their unauthorized exercise of power in frustrating, with no public announcement by written opinion or otherwise, a duly enacted state statute, thereby violating the separation of powers clause of the constitution and depriving the public of a substantive right to have the state's highest judicial tribunal rule upon constitutionality or validity of state misdemeanor statutes.

A particularly insidious consequence of such conduct of the Appellees is the realization that ordinary, and even extraordinary, techniques of legal research in behalf of all who come after this Appellant must fail in discovering that the justices of the Nevada Supreme Court have argued, in a federal forum, and succeeded, in having Nevada's remedial certiorari statute held unconstitutional through the clever device of persuading such court to first disavow the existence of such statute and to then add, hypothetically, that if such a statute existed, it would be unconstitutional. Research of annotations, digests, citators, and other reference works will find no references to Appellant's cases, because neither Appellees, acting as the state supreme court, in the three earlier cases brought by Appellant in that forum, nor the federal district court in the instant case, or the U.S. Court of Appeals for the Ninth Circuit in the instant case, cite NRS 34.020, Paragraph 3. No man, not even those trained in the law, can be presumed to know the law if both state and federal courts can repeal or alter, de facto, and without reported opinion, the legislative acts of a state, as has been done in the instant case.

As a collateral point, Appellant, as well as all other residents of Nevada, has been further deprived of due process of law in that Appellees, who are elected officeholders, have deprived the public of a substantive right granted by elected legislators, and have done so without public

proclamation, in contravention of the Nevada Constitution, and therefore in violation of due process rights.

Such a continuing course of conduct, violative of federal due process rights, can most logically be examined with optimum precision and adequate remedial power through the plenary consideration of the United States Supreme Court.

(g). Not applicable.

(h). No written opinions, reported or otherwise, were delivered upon the rendering of the judgment sought to be reviewed, nor were there earlier unreported opinions or companion opinions. Neither the United States District Court for the District of Nevada nor the U.S. Court of Appeals for the Ninth Circuit made findings of fact and conclusions of law.

(i). The judgment appealed from was announced by order as follows:

"UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN W. FIRTH,

Plaintiff-Appellant, No. 75-2778

v.

GORDON THOMPSON, et al.,

Defendants-Appellees.

BEFORE: WRIGHT, CHOY and GOODWIN,
Circuit Judges

Following oral argument, it was announced in open court that the judgment of the District Court is affirmed.

The mandate will issue at once and no petition for rehearing will be entertained."

In the upper righthand corner, the order bore a stamp indicating:

"FILED Jun 21 1976 EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS"

Longhand initials, in ink, appeared above and to the right of "JR."

On May 30, 1975, the judgment of the United States District Court for the District of Nevada, affirmed on appeal, had been entered, and it read as follows:

"IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIAN WILLIAM FIRTH, Civil No.R-2928BRT
Plaintiff,
vs.
GORDON THOMPSON, et al,
Defendants.

JUDGMENT

Responsive to the Motion for Relief from Order filed by plaintiff on April 2, 1975, the Court has reviewed the file and the briefs and has reaffirmed its conclusion that the Petition for Declaratory Judgment should be denied. Accordingly,

IT HEREBY IS ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by virtue of the Petition for Declaratory Judgment and that the action be, and it hereby is, dismissed.

Dated: May 30, 1975.

/s/ bruce r. thompson
UNITED STATES DISTRICT JUDGE"

The original order of the U.S. District Court, entered on March 11, 1975, read as follows:

"IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIAN WILLIAM FIRTH, Civil No.R-2928BRT
Plaintiff,
v.
GORDON THOMPSON,
et al.,
Defendants.

ORDER

This matter came on for hearing on March 7, 1975, at 1:30 o'clock P.M. Plaintiff and Plaintiff's attorney were not present. Attempts to contact Plaintiff's attorney were unsuccessful. At 2:00 o'clock P.M., defendants' argument was presented by their attorney, Patrick B. Walsh, Deputy Attorney General, appearing.

The court finds there is no reason to believe the denial of plaintiff's writs of certiorari to be for any reason other than lack of merit. The court is aware of no statute that forces the Nevada Supreme Court to issue a writ of certiorari if that court finds the petition lacking in merit. The court further finds that if there were such a statute, it would be unconstitutional.

Accordingly, IT IS HEREBY ORDERED that the petition for declaratory judgment be and it hereby is denied.

Dated: March 11, 1975.

/s/ bruce r. thompson
UNITED STATES DISTRICT JUDGE"

The foregoing was issued on legal cap bearing the text "Attorney General's Office, Carson City, Nevada" followed by a printer's logo with "103" beneath it, all in the lower left corner.

(j). The Notice of Appeal was filed in the U.S. Court of Appeals for the Ninth Circuit on September 17, 1976, and it read as follows:

"BRIAN WILLIAM FIRTH,
Appellant,
vs.
GORDON THOMPSON,
et al., Justices of the
Supreme Court of the State
of Nevada,
Appellees.

No. 75-2778
DC# CV-2928

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that BRIAN WILLIAM FIRTH, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment, affirming the judgment of the United States District Court for the District of Nevada, entered in this action on June 21, 1976.

This appeal is taken pursuant to 28 U.S.C. Section 1254(2)

/s/ jerry collier lane
JERRY COLLIER LANE
Counsel for Appellant

PROOF OF SERVICE

I, JERRY COLLIER LANE, ESQ., Attorney for Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 16th day of September, 1976, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the Appellees thereto by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to their attorney of record, Robert List, Esq Attorney General of the State of Nevada, Supreme Court Building, Carson City, Nevada 89701

/s/ jerry collier lane
Counsel for Appellant"

PROOF OF SERVICE

I, JERRY COLLIER LANE, ESQ., Attorney for Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 29th day of October, 1976, I served a copy of the foregoing Jurisdictional Statement on the Appellees by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to their attorney of record, Robert List, Esq., Attorney General of the State of Nevada, Supreme Court Building, Carson City, Nevada 89701.

Jerry Collier Lane
JERRY COLLIER LANE
P.O. Box 2028
Carson City, Nevada 89701

Supreme Court, U. S.
FILED
NOV 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76–614

BRIAN WILLIAM FIRTH,

Appellant,

v.

GORDON THOMPSON, et al, Justices of the Supreme Court of the State of Nevada,

Appellees.

MOTION TO DISMISS PURSUANT TO RULE 16, REVISED RULES OF THE UNITED STATES SUPREME COURT

Jerry Collier Lane
P.O. Box 2028
Carson City, Nevada 89701
Attorney for Appellant

Robert List
Attorney General
Supreme Court Building
Capitol Complex
Carson City, Nevada 89710
Attorney for Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

* * * *

October Term 1976

* * * *

76-614

BRIAN WILLIAM FIRTH, Appellant

v.

GORDON THOMPSON, et al, Justices of the Supreme Court of the State of Nevada, Appellees

MOTION TO DISMISS PURSUANT TO RULE 16, REVISED RULES OF THE UNITED STATES SUPREME COURT

Appellees, Gordon Thompson, et al, Justices of the Nevada State Supreme Court, respectfully move this Court to dismiss the appeal heretofore taken in this cause pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States on the grounds that the appeal is not within the jurisdiction of this Court because it is not taken in conformity with these rules, it does not present a substantial federal question and that the judgment of the lower courts rests on adequate non-federal bases.

BRIEF AND ARGUMENT

I

THE APPELLANT HAS FAILED TO DOCKET HIS CASE WITHIN THE TIME REQUIREMENTS OF RULE 13 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

Rule 13 of the Revised Rules of the Supreme Court of the United States requires that the case be docketed "not more than ninety days after the entry of the judgment appealed from ...." The final judgment of the United States Court of Appeals for the Ninth Circuit in this proceeding was entered on June 21, 1976. The time for docketing this case on appeal expired September 20, 1976. This case was subsequently docketed in the Supreme Court of the United States on November 1, 1976, more than 50 days after the final date for docketing. On September 17, 1976, appellant filed an application for extension of time to docket the appeal. However, the application for extension of time in which to docket the appeal was denied by the Honorable Justice Renquist on September 22, 1976.

Therefore, this appeal has not been docketed in accordance with Rule 13 and should be dismissed pursuant to Rule 16(1)(a).

II

NO SUBSTANTIAL FEDERAL QUESTION HAS BEEN PRESENTED BY THE APPELLANT AS REQUIRED BY 28 U.S.C.A. 1254(2).

On March 15, 1971, appellant was issued a ticket by an officer of the Nevada Highway Patrol for speeding and running a stop sign. After issuing the citation to the appellant, the patrolman returned to his car. Appellant thereafter drove at a speed of 65 miles per hour in a 50 mile per hour zone at which time he was stopped again and given another citation for speeding. Record on appeal to U.S. Court of Appeals for the Ninth Circuit, hereinafter referred to as "Record on Appeal", pp 92 - 94.

The appellant was subsequently convicted of three charges in justice court. He appealed to the district court pursuant to Article 6, Section 6 of the Nevada Constitution and NRS 3.190, Subsection 2. In a trial de novo, he was again convicted on April 5, 1971. There is nothing in the court's decision to suggest that it had ruled on the constitutionality of the traffic ordinances involved. Record on Appeal, page 100. Appellant then filed a Petition For Writ of Certiorari on May 14, 1971, Case No. 6641, in the Supreme Court of the State of Nevada. This petition was dismissed on May 19, 1971, and a Petition for Rehearing was filed June 3, 1971. Order Denying Rehearing was filed June 23, 1971.

On November 27, 1970, the appellant was ticketed in Reno, Nevada, for failure to have at least two operative tail lenses. He was convicted in Justice Court on June 20, 1971, and fined. The appellant thereafter appealed to the Second Judicial District Court for a trial de novo and was subsequently convicted by virtue of the statement of facts (Record on Appeal, page 104) and the brief submitted by appellant in pro. per. Nowhere in said court file is there an order or judgment passing upon the constitutionality of the traffic laws in question. Record on Appeal, page 108. Appellant then filed for a Petition for Writ of Certiorari to the Nevada State Supreme Court on July 28, 1971. The court dismissed the Writ on September 28, 1971, holding:

> "Upon consideration by the court of the Petition for a Writ of Certiorari, and response in opposition thereto filed by respondent; and the court being unable to find any arguable issues presented by the petition to warrant further consideration; the court further finding that the petition is without merit for failure to cite any supporting authorities; and good cause appearing, it is
>
> "ORDERED that the respondent's motion to dismiss is granted, and the Petition for a Writ of Certiorari is dismissed. Riverside Casino Corp. v. Brewer Co., 80 Nev. 153, 390 P.2d 232 (1964); Smithart v. State, 86 Nev. 925, 478 P.2d 576 (1970); (other citations omitted)."

In a third case, the appellant was again given a traffic citation for the offense of crossing a double yellow center line and passing another vehicle. He was convicted in justice court and appealed to the Second Judicial District Court for a trial de novo resulting in a conviction on April 9, 1971. Thereafter, the appellant filed a Petition for Writ of Certiorari on July 21, 1972. On August 22, 1972, the Nevada Supreme Court ordered the Petition for Writ of Certiorari denied without opinion. Appellant's counsel sought an extension of time for filing a Petition for Rehearing, and on September 21, Petition for Rehearing was filed. On September 28, 1972, the Petition for Rehearing was denied.

At no time in the lower courts has the appellant raised any federal question, much less, a substantial federal question as is required by this honorable court. Therefore, appellant has not satisfied the jurisdictional requirements of 28 U.S.C.A. 1254(2). It is well established that when an appeal to the U.S. Supreme Court is attempted in the absence of a statutory ground for such appeal it will be dismissed for want of jurisdiction. Hunter Co. v. McHugh, 320 U.S. 222 (1943). Thus, dismissal of the appeal may result where no revealable federal question is involved or where the asserted federal question is unsubstantial or frivolous or has been foreclosed by prior decisions of the state court. Leonard v. Vicksburg, S. & P.R. Co., 198 U.S. 416 (1905). Madison v. Stanolind Oil and Gas Co., 305 U.S. 376 (1939).

It is clear from the orders of the Nevada Supreme Court in cases 6641 and 6706, attached hereto, that the Nevada Supreme Court considered the merits of the appellant's Petitions for Writ of Certiorari. In both cases the court, after consideration, found there to be no arguable issues and dismissed appellant's Petitions for Writ of Certiorari.

Thereafter, appellant filed a petition in U. S. District Court for the District of Nevada, asking for declaratory relief from the Nevada Supreme Court's denial of appellant's writs of certiorari. The Honorable Bruce R. Thompson denied appellant's petition for declaratory judgment as well as subsequent "Motion for Relief" for lack of merit. Appellant then appealed to the Ninth Circuit Court of Appeals which affirmed the judgment of the District Court.

It is clear that the reason for the dismissals was for lack of merit and that there was no denial of the appellant's constitutional right of due process.

III

THE DETERMINATION BY THE NEVADA SUPREME COURT TO DENY THE APPELLANT'S WRIT FOR CERTIORARI RESTED ON ADEQUATE NON-FEDERAL GROUNDS.

All of the original traffic citations received by appellant were within the original jurisdiction of the Nevada.justice courts. Article 6, Section 4, and Article 6, Section 6, of the Nevada Constitution set forth the jurisdiction of the Nevada courts. Article 6, Section 6, jurisdiction of district courts states:

> "They shall also have final appellate jurisdiction in cases arising in justice courts and such other inferior tribunals as may be established by law."

Nevada Revised Statute 34.020 is set forth by appellant as valid grounds for obtaining certiorari by the Nevada Supreme Court under his facts. However, to the extent that NRS 34.020 is an attempt by the legislature to override the Constitution of the State of Nevada and requires the Nevada State Supreme Court to entertain proceedings that originally began in justice courts, NRS 34.020 is unconstitutional. It is a violation of the separation of powers clause of Article 3, Nevada State Constitution. A reading of Article 6, Sections 4 and 6 of the Nevada Constitution leaves no doubt that review as a matter of right in cases arising in justice courts ends in district court. Appellate review as a matter of right in the Supreme Court exists in criminal cases only where those cases originated in the district court. Therefore, there is no right to appellate review in the Nevada Supreme Court for cases arising in justice courts. An order authorizing proceedings in certiorari in the Nevada Supreme Court is a discretionary order. Nevada Lincoln Mine Co. v. District Court, 43 Nev. 396, 402; 187 P. 1006 (1920).

Because the Nevada Supreme Court has the constitutional authority to review through the discretionary writ of certiorari, convictions of municipal and justice courts, any effort by the legislature to

circumscribe this judicial authority such as NRS 34.020, is unconstitutional. It conflicts with the rules of court thus coming into conflict with Article 3, Section 1 of the Nevada Constitution which provides for the division of the powers of government and prohibits persons charged with the exercise of powers properly belonging to one of the three separate departments from exercising any function appertaining to any of the others. Any legislation undertaken to require judicial action within fixed periods of time is an unconstitutional interference by the legislature with a judicial function. See Lindauer v. Allen, 85 Nev. 430, 456 P.2d 851 (1969).

Therefore, it is respectfully requested that this honorable court dismiss appellant's appeal in accordance with, and pursuant to, Revised Supreme Court Rules 16(1)(a) and 16(1)(b).

Respectfully submitted this 16th day of November, 1976.

ROBERT LIST
Attorney General

JAMES H. THOMPSON
Chief Deputy
Attorney General

DONALD C. HILL
Deputy Attorney
General

Counsel for
Respondents

IN THE SUPREME COURT

OF THE STATE OF NEVADA

BRIAN WILLIAM FIRTH, Petitioner, vs. SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, Respondent.	)	No. 6706 (Filed Sep 28, 1971)

ORDER OF DISMISSAL

Upon consideration by the court of the petition for a writ of certiorari, and the response in opposition thereto filed by the respondent; and the court being unable to find any arguable issues presented by the petition to warrant further consideration; and the court further finding that the petition is without merit for failure to cite any supporting authorities; and good cause appearing, it is

ORDERED that the respondent's motion to dismiss is granted, and the petition for a writ of certiorari is dismissed. Riverside Casino Corp. v. Brewer Co., 80 Nev. 153, 390 P.2d 232 (1964); Smithart v. State, 86 Nev. 925, 478 P.2d 576 (1970); Carson v. Sheriff, 87 Nev. ___, 487 P.2d 334 (1971); Marshall v. Sheriff, 87 Nev. ___, ____P.2d ____, (Case No. 6658 filed September 23, 1971).

/s/ Zenoff, C.J.

/s/ Batjer, J.

/s/ Mobray, J.

cc: Counsel of record

IN THE SUPREME COURT

OF THE STATE OF NEVADA

BRIAN WILLIAM FIRTH, Petitioner,	)	No. 6641
vs.	)	
FIRST JUDICIAL DISTRICT COURT of the STATE OF NEVADA, Respondent.	)	(Filed May 19, 1971.)

ORDER OF DISMISSAL

Upon consideration of the petition for a writ of certiorari with its supporting exhibit, the court finds that there are presented no arguable issues to warrant the granting of the requested writ.

CONSEQUENTLY, we decline to order the filing of a response to the petition; and good cause appearing, it is

ORDERED that the petition for a writ of certiorari is dismissed.

/s/ Zenoff, C.J.

/s/ Batjer, J.

/s/ Mowbray, J.

cc: Hon. Robert List, Attorney General
Hon. Michael Fondi, District Attorney
Hon. Vaughn Smith, Clerk
Jerry C. Lane, Esq.

Supreme Court, U. S.
FILED
DEC 6 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1976

\+ + + No. 76-614

BRIAN WILLIAM FIRTH, Appellant,

v.

GORDON THOMPSON, et al, Justices of the Supreme Court of the State of Nevada,
Appellees

\+ + + + + +

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Jerry Collier Lane
P.O. Box 2028
Carson City, Nevada
89701

Attorney for Appellant

Robert List
Attorney General
Supreme Court Building
Capitol Complex
Carson City, Nevada
89710

Attorney for Appellees

I

Jurisdiction attaches upon a timely filing of a notice of appeal. Appellant's failure to docket an appeal until 56 days after the expiration date of the 6-day period provided by Rule 13(1) is a defect which is not jurisdictional. Johnson v Florida, 391 US 596, 20 L Ed 2d 838, 88 S Ct 1713.

II

Although the Application for Extension of Time to Docket the Appeal was denied by the Honorable Mr. Justice Rehnquist, the application did contain an explanation of the fact that Appellant's counsel had telephoned the Office of the Clerk of the Supreme Court of the United States on September 16, 1976 to ascertain the status of the motion to admit him to the United States Supreme Court Bar, and was thereupon informed that admission had been granted three days earlier. With only four days remaining before the filing deadline, the application for a 60-day extension was mailed immediately, and the notice of appeal was driven by automobile for timely filing in San Francisco on September 17th. The delay during the early part of August in filing the motion for admission was caused by the paucity of United States Supreme Court Bar members residing in Carson City who were then available, and by the fact that one such member, one of Appellees' counsel, James H. Thompson, Esq., Chief Deputy Attorney General of Nevada, refused to sign such motion unless Appellant's counsel could assure him that no matters involving the State of Nevada as an adversary would be filed in the United States Supreme Court. Appellant's counsel could not give that assurance, for obvious reasons

III

Pages 3 through 6 of Appellees' Motion to Dismiss reveal a manifest lack of comprehension of the issues raised in this appeal, viz., those specifically set forth in Appellant's Jurisdictional Statement in Paragraph 1(c) at pages 1 through 3 thereof. Appellees, instead of addressing the federal issues raised, attempt to obscure such issues by setting forth a review of the circumstances involved in the underlying misdemeanor prosecutions in the state courts. (Pages 3-6 of Appellees' Motion to Dismiss.)

IV

The remaining pages of Appellees' Motion to Dismiss, pages 6 through 8, reveal the longstanding and continuing confusion among Appellees and the Office of the Attorney General of Nevada as to (1) appeal or appellate review, governed in Nevada by Article 6, Sections 4 and 6, of the Nevada Constitution, which provide for final appellate review in the district court as to matters arising in municipal or justice's courts, and (2) the substantive right of every person convicted in a municipal or justice's court, who meets the statutory conditions precedent, to have the Nevada Supreme Court rule upon the constitutionality or validity of the statute under which the conviction occurred. Such right, granted by the Nevada Legislature in 1939 (NRS 34.020(3)) has nothing to do with trial court errors or other aspects of appeals or appellate review, and therefore such statute does not contravene the aforementioned Article 6 of the Nevada Constitution. It merely provides the procedural device, a special statutory writ of certiorari, for having the highest echelon on the judicial branch of the government of the State of Nevada rule upon the constitutionality or validity of legislative acts, which, by mandate of Article 4, Section 21, of the Nevada Constitution, must be general and of uniform operation throughout the state. Compliance

with such mandate would be logically and legally impossible if the district courts for the 17 counties of Nevada were given the ultimate power to rule upon constitutionality or validity of state statutes. Thus, although not perceived by Appellees, (See page 7 of Appellees' Motion to Dismiss), NRS 34.020(3) is not "an attempt by the legislature to override the Constitution of the State of Nevada" but is instead an act by the legislature to facilitate compliance with Article 4, Section 21, of the Nevada Constitution. Further, no place exists in the law of Nevada whereby the Office of the Attorney General is empowered to determine constitutionality of state statutes, and, Appellees, sitting as the Nevada Supreme Court, have not held NRS 34.020(3) unconstitutional. Appellees' counsel is unquestionably without authority to do so.

V

In the first paragraph of Page 6 of Appellees' Motion to Dismiss, the admission is once again made that "the Nevada Supreme Court considered the merits of the appellant's Petitions for Writ of Certiorari," which, although proper under federal certiorari law and that in a minority of jurisdictions, is contrary to Nevada law, which requires a return, and a hearing on the return of the writ. It is at such hearing that the merits are to be considered, and not before. A petitioner under NRS 34.020(3) is to be provided his day in court before the state's highest tribunal in order to present the merits of his contention of unconstitutionality or invalidity of a state statute. Unfortunately, the United States District Court for the District of Nevada was inappropriately led down the same erroneous path and it applied federal certiorari law to an unwarranted consideration of the circumstances underlying the original state court prosecutions, instead of issuing a declaratory judgment in reference to NRS 34.020(3) and Appellees' conduct in reference thereto. The Ninth Circuit Court of Appeals fared no better on the point.

VI

The denial of Appellant's right to due process of law has been egregious in that Appellees have never afforded Appellant his day in court to argue the unconstitutionality or invalidity of any statute under which he had previously been convicted, notwithstanding a clear legislative mandate to provide such redress.

Therefore, Appellant asks this Honorable Court to deny Appellees' Motion to Dismiss.

Respectfully submitted this 3rd day of December, 1976.

JERRY COLLIER LANE
Attorney for Appellant

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PROOF OF SERVICE

I, JERRY COLLIER LANE, ESQ., Attorney for Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of December, 1976, I served a copy of the foregoing Brief in Opposition to Motion to Dismiss on the Appellees by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to their attorney of record, Robert List, Esq., Attorney General of the State of Nevada, Supreme Court Building, Capitol Complex, Carson City, Nevada 89710.

JERRY COLLIER LANE